

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DIANE RAINY,)
)
Plaintiff(s),)
)
vs.) Case No. 4:07CV00355 ERW
)
JOHN MCWRIGHT, et al.,)
)
Defendant(s).)

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant City of Berkeley's Motion to Dismiss Plaintiff's Third Amended Complaint [doc. #65], and Plaintiff's Motion to Dismiss Without Prejudice as to City of Berkeley [doc. #72].

I. BACKGROUND

Plaintiff filed suit against Defendants John McWright, The Finish Line Man Alive, Inc., Northwest Plaza, Inc., Professional Security Consultants, Inc., and NW Plaza Owner, LLC on February 21, 2007 alleging a violation of § 1983, and negligence. Plaintiff's filed three amended complaints, in the final amendment, on March 26, 2008, Plaintiff added the City of Berkeley, Missouri ("Defendant City") as a Defendant in this matter. On April 23, 2008, the Defendant City filed a motion to dismiss the claims against it. Plaintiff did not directly respond to Defendant City's motion, however, on May 14, 2008, Plaintiff filed a motion to dismiss the complaint against Defendant City, without prejudice. The Court will now address both pending motions.

Under Federal Rule of Civil Procedure 41, a plaintiff may dismiss a case without a court order only if done prior to the defendant filing an answer. Fed. R. Civ. P. 41(a)(1). "Except as

provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. . . . Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice." Fed. R. Civ. P. 41(a)(2). In accordance with these rules, Plaintiff seeks an order of this Court dismissing the action against the Defendant City without prejudice.

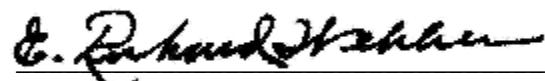
While the Court recognizes that the Defendant City filed a motion to dismiss, which would ordinarily result in a dismissal of an action with prejudice, Defendant City has not filed an objection to Plaintiff's request to dismiss the action without prejudice. Defendant City had until May 27, 2008 to file an objection, and failed to do so. Therefore, the Court determines that a dismissal without prejudice is appropriate in this case. The Court will Grant Plaintiff's motion, and deny Defendant City's pending motion as moot.

Accordingly,

IT IS HEREBY ORDERED that Defendant City of Berkeley's Motion to Dismiss Plaintiff's Third Amended Complaint [doc. #65] is **DENIED as moot**.

IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss Without Prejudice as to City of Berkeley [doc. #72] is **GRANTED**.

Dated this 3rd Day of June, 2008.



E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE